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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WILLIAM J. BUTTFIELD, PLAINTIFF IN error,
against
NEVADA N. STRANAHAN, COLLECTOR OF the port of New York.
} No. 294.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

This is the last of a series of cases which have been brought in different forms for the purpose of testing the constitutionality of the Tea-Inspection act of March 2, 1897, 29 Stat., 604. (*Sang Lung* v. *Jackson*, 85 Fed. Rep., 502; *Cruickshank* v. *Bidwell*, 86 Fed. Rep., 7; 176 U. S., 73; *Buttfield* v. *Bidwell*, 94 Fed. Rep., 126; 96 Fed. Rep., 328; *United States ex rel. Hamilton* v. *Gage*, Sup. Ct. Dist. Col., 1901; *Buttfield* v. *Bidwell*, No. 296 of this term.)

As appears by the record in the case last named (which was brought against the predecessor of the

present collector of the port of New York), the defendant claimed that the steps taken by Mr. Buttfield were not sufficient foundation for an action of tort, even if the statute were unconstitutional. The Bidwell case was tried October 22, 1902, and the nature of defendant's objection then disclosed to the plaintiff. In the following week, on November 2, 1902, Mr. Buttfield made upon the present collector a demand for eight packages of tea theretofore imported by the steamship *Adana*, tendering him the duties in full, and thus putting him in the position of a tort feasor in case of his refusal and of the unconstitutionality of the statute (pp. 11–12). The present action was commenced December 4, 1902, and tried in the following April before Judge Coxe and a jury. A verdict was directed for the defendant, and (a constitutional point being involved) a writ of error taken directly to this court.

STATEMENT OF FACTS.

The importation of the eight packages of tea in the *Adana* was made in January, 1902. The proper steps were taken by the plaintiff for the purpose of entering and bonding the teas and having them examined for the purposes of the tea-inspection act. They were not rejected for impurity or unwholesomeness, but they were found to be "inferior to standard in quality." It is admitted that they were reasonably pure and not deleterious to health, but that they "were in fact inferior in

quality to said standard, provided that by 'quality' is meant taste and flavor" (pp. 10, 11). Plaintiff nevertheless tendered the duties and demanded a permit to withdraw the tea for consumption. The collector refused on the ground that the withdrawal was not "in accordance with the requirements of article 1308, Regulations of 1899" (pp. 11–15); that is, the act of 1897 (p. 16). Plaintiff then requested an export withdrawal permit, so that he could ship the teas out of the country. This also was refused on the ground that "the six months fixed by the act of March 2, 1897, within which exportation is allowable has already expired" (pp. 16, 17). The collector thereupon ordered the teas to be sent to the United States public stores for destruction, and they were accordingly there destroyed (pp. 10–17).

THE ACT OF 1897.

This is entitled "An act to prevent the importation of impure and unwholesome tea." Section 1 provides as follows:

> That from and after May 1, 1897, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited.

Section 2 provides for the appointment by the Secretary of the Treasury on or before February

15 of each year of "a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea."

Section 3 is as follows:

> That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Section 4 provides that on entering any tea at the custom-house the importer or consignee shall give a bond to the collector that it shall not be removed until released by him, "after it shall have been duly examined with reference to its purity, quality, and fitness for consumption;" the examination to be made by an examiner of teas.

Section 5 provides for such examination.

Section 6 is as follows:

That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

Section 7 is as follows:

That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose

> samples of the merchandise, obtained in the manner prescribed by section 4 of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Section 8 contains administrative regulations concerning the reexamination by the Board of General Appraisers and provides that the decision of the Board shall be in writing and shall be transmitted to the collector—

> who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The Board of United States General Appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

Section 9 provides that no rejected teas which have been exported under the provisions of the act shall be reimported under penalty of forfeiture.

Section 10 empowers the Secretary of the Treasury "to enforce the provisions of this act by appropriate regulations."

THE TREASURY REGULATIONS.

The Treasury Regulations which were in effect at the time of the importation of these teas are matter of which this court may take judicial notice. (See *Caha* v. *United States*, 152 U. S., 211; *Cosmos Co.* v. *Eagle Co.*, 190 U. S., 301, 309.) The important passages are contained in the record in case No. 296. They are as follows:

> XI. The examination of tea by examiners or boards of United States general appraisers under this act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis.
>
> XIX. The following are the standards selected by the board of tea experts, which are hereby fixed and established as standards under this act for the year 1901:
>
> No. 1. Formosa Oolong.
> No. 2. Foochow Oolong.
> No. 3. North China Congou.
> No. 4. South China Congou.
> No. 5. India tea (use for Ceylon tea).
> No. 6. Pingsuey, green tea.
> No. 7. Country green tea.
> No. 8. Japan tea, pan fired (use for sun dried).
> No. 9. Japan tea, basket fired.
> No. 10. Japan tea, dust or fannings.
> No. 11. Capers (use for scented Orange Pekoe).
> No. 12. Canton Oolong. (a)
> No. 13. Scented Canton. (a)

COMPARISON WITH STANDARDS.

XX. In comparing with standards, examiners are to test all the teas on these points, namely: For *quality*, for any foreign matter on the surface of the infusion, sometimes called *scum*, and for *quality of infusion*. *Quality* shall be ascertained by drawing, according to the custom of the tea trade, with the weight of a half dime to the cup. The quality must be equal to standard, but the flavor may be that of a different district as long as it is equal in sweetness.[a] As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned.

XXI. In order to test for floating coloring matter or *scum*, and also for the *quality of infusion*, a *second drawing* should be made of *double the foregoing weight*. Before disturbing the infusion examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a larger quantity of exhausted or decayed leaf or foreign substance than the standard, it shall be considered inferior in quality, and the tea must be rejected. In Greens and Japans particularly the brightness of the leaf should be considered as an evidence of quality.

[a] A trade term referring to tea flavor, not saccharine flavor.

XXII. Should a tea prove, on examination, to be inferior to the standard in any one of the requisites, viz, quality, scum, or quality of infusion, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

XXIX. In all cases of rejections by examiners, the importer should be notified of the reason for rejection—that is, whether it be on the ground of quality, character of infusion, dust, scum, or admixture with foreign substance.

HISTORY AND OBJECTS OF THE STATUTE.

It is well settled that in construing an act not only is prior legislation *in pari materia* to be considered, but also it is important to examine the original form of the bill and the way in which the amendments thereto were inserted, for which purpose the journals of Congress may be considered (*Blake* v. *National Banks*, 23 Wall., 307; *Legal Tender Cases*, 12 Wall., at p. 559; *United States* v. *Burr*, 159 U. S., at p. 85; *Chesapeake Co.* v. *Manning*, 186 U. S., 238, 245), and (while it is not permitted to examine the debates of Congress), it is proper to examine the reports of Congressional committees, upon which reports the action of Congress was based. (*The Delaware*, 161 U. S., 459, 472.)

The former act *in pari materia* was the act of March 2, 1883, ch. 64 (22 Stat., 451), entitled "An

act to prevent the importation of adulterated and spurious teas." The first section of this act prohibited the importation of "any merchandise for sale as tea adulterated with spurious leaf or with exhausted leaves or which contains so great an admixture of chemicals or other deleterious substances as to make it unfit for use." The act provided for an examination of the merchandise "with reference to its purity and fitness for consumption" (section 2). "Exhausted leaves" were defined to "mean and include any tea which has been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means" section 6). It will be noticed that the act treated the specific things prohibited under the first section as including whatever was inconsistent with the purity and fitness for consumption of the tea.

In practice the phrase "deleterious substances" came to have a very broad signification, including not only substances other than tea, but also tea leaves which had suffered by careless picking or bad curing; and customs officers were as early as 1889, many years before the passage of the present act, cautioned to secure a strict examination of teas of this character. Assistant Secretary Tichenor directed the collector of this port on July 30, 1889 (Syn. Dec. 9534), as follows:

> The statements of the consul and the documents inclosed in his communication indicate that it is a well-recognized fact among dealers in China, that Amoy Oolongs

> are generally dirty, adulterated, carelessly picked or poorly cured, and their reputation is so vile that all markets, save that of the United States, are now closed to them.
>
> A circular letter issued by Messrs. Russel & Co., of Amoy, speaks of these teas as the decayed vegetable matter of China, and states that it is difficult to understand how, under the existing inspection regulations, they can be dealt in.
>
> * * * * *
>
> Your attention is called to this matter in order that a strict scrutiny may be made at your port of all importations of this grade of teas with a view to prevent the admission of any which may be found to be in violation of the act prohibiting the importation of adulterated and spurious teas.

The act of 1883 contained no provision for the establishment of Government standards, and its administration was far from uniform, both on this account and because the act left so wide a discretion in the examiner as to what is "deleterious"—for there is a very great difference of opinion as to the hygienic character of these low-grade teas such as described in the Treasury circular above quoted.

The act of 1897 as originally introduced was drafted for the double purpose of establishing definite standards in the interest of uniformity and broadening the statute by omitting all phrases which might restrict the meaning of the term "fitness for consumption." The bill was introduced January 22, 1897, by Senator Hill, and bears the

number 3581. It is entitled "A bill to prevent the importation of impure and unwholesome tea." It strikes out the words above quoted from the first section of the act of 1883, and substitutes therefor the words "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." Section 3 provided for the adoption of standards and deposit of samples, the standards so fixed "to be the standards for *purity and fitness for consumption* of teas permitted or sold within the United States." The Secretary of the Treasury, through his power of confirming the recommendations of the board of tea experts, was thus made the arbiter of fitness for consumption as well as of purity; "fitness for consumption" was treated as equivalent to "wholesomeness;" and the word "unwholesome" was doubtless regarded as including everything which under the prior act had been considered "deleterious."

The bill was referred to the Committee on Commerce, which amended the bill in various respects, submitting the amended bill in the form of a substitute. (Senate bill 3725.) The only amendment important to the case at bar was the insertion of the word "quality" after the word "purity" at every one of the many points where the phrase "purity and fitness for consumption" occurred in the bill, so that the phrase should read "purity, *quality*, and fitness for consumption." With the substitute the committee presented a report drawn

by Senator White, of California. (Senate report 1527, Fifty-fourth Congress, second session, February 23, 1897.) The report stated that the committee had taken evidence on the subject and had submitted the original bill to the Secretary of the Treasury, who reported a substitute practically identical to the one now presented.

The report shows clearly that while the unwholesomeness of the teas to be excluded was borne in mind as an important element, the effect of the law was intended to be still more sweeping and to shut out the lowest grades of tea (or what was being sold as tea) altogether as "unfit for use." Among the consequences of the law of 1883, the committee reported that "millions of pounds of tea unfit for use are being constantly admitted," while our people "are now drinking the lowest average grade of tea ever before known, *while many consumers are giving it up altogether.*" The remedy proposed is the establishment of standards of the "lowest grade of tea fit for use." The effect of the amendment, in addition to the securing of uniformity by the establishment of standards, is stated as follows:

> (4) The tea trade of the United States will be benefited by having trash, *which is ruining the business* and which has for many years constituted the principal part of the surplus supply, effectually excluded.
>
> (5) The consumers of the United States will be protected as never before *from the imposition upon them of worthless rubbish* and be sure of receiving an article fit for use.

In fact, a great mass of very low-grade tea, or merchandise imported as tea, had come upon the American market and was being sold, which was of a quality regarded in the trade as worthless. Its effect was believed by a great majority of the trade (and, on their representations, by Congress) to be a fraud upon the consumer; so much so that it tended to drive tea out of consumption altogether in the districts where these low-grade goods had been most successfully worked off. Certain reckless importers, while making great profits for themselves, were thus not only giving opportunity for fraud by middlemen upon the consumer, but were inflicting injury in the long run upon the trade as a whole—an injury which would be shared by the United States Treasury whenever, as afterwards occurred, it might need the benefit of a revenue duty upon tea.

An example of the frauds from which the public is protected by this statute is to be found in the facts of this particular case as they came out upon the trial. Of course the people who drink tea drink it for its taste and flavor. They do not know when they buy the tea what the taste and flavor are going to be. Other things being equal, the best taste and flavor belong to what is called the Gunpowder tea, which represents the small leaves at the top of the tea plant; the difference in flavor between this Gunpowder tea and the Hyson, which represents the coarse leaves near the bottom of the tea plant, being very great. There are many

grades of tea plants, however, in each producing district, and the Hyson of a higher grade may be much better than the Gunpowder of a lower grade. Now, the ignorant consumer, or even retailer, not knowing of the existence of the great variety of grades recognized by these witnesses (as, for instance, the "Finest Wenchow," which is no better than tenth grade "Moyune"), is apt to select a beautiful-looking Gunpowder of a low grade instead of a Hyson of a much higher grade—that is, much superior in the attributes on account of which tea is actually consumed. Thus Mr. Buttfield here concedes that his imports (although Gunpowders) were inferior in taste and flavor to the standard (which is a Hyson); *yet the market price of the standard was 10 1-2 cents, while the market price of the rejected tea was 20 cents.* The wholesalers got this higher price for the inferior article because "people who buy tea from them buy it on the appearance and not on the taste and flavor" (pp. 30–31).

SUBSEQUENT ADMINISTRATION OF THE STATUTE.

In *Cruickshank* v. *Bidwell*, which was argued here in November, 1899, the Government brief contained the following statement concerning the administration of the statute up to that time:

> A great majority, as we are informed, of the persons constituting the tea trade of the United States—importers, jobbers, and retailers alike—have been led by their experience of the practical workings of this act to

give it their entire approval. No complaint has been heard from the consumers. The price to them has been raised little, if at all, while for the first time the tea consumed in the United States is now everywhere good. This great advance in our material comfort is the direct result of the act of 1897.

As above stated, the Secretary of the Treasury, aided by the boards of tea experts of 1897, 1898, and 1899, has used his best endeavors to fix standards so low that the cheapest teas which are pure and genuine, unaffected by foreign flavors and possessing the flavor of tea in substantial strength, can come freely into the United States. Cheaper grades are regarded as doubtful in purity, even though impurity can not affirmatively be shown. At the very start it was endeavored to establish a standard for each producing district. (*Syn. Dec.* 17995, April 21, 1897.) When the Sang Lung case above cited, and the complaints out of which it arose, showed that one district had been overlooked, it was immediately added by a supplemental order of the Secretary. (*Syn. Dec.* 18554, November 6, 1897.) Since the flavor is necessarily used as a test of fitness for consumption, it was also expressly ordered that it should be used only as an index for that purpose and not "limited to the particular characteristics of the tea district from which the standard comes." (Id.) By a subsequent circular it was directed "that the flavor may be that of a different district so long as it is equal in sweetness"

(*Syn. Dec.* 18933, February 7, 1898), the word "sweetness" being a trade term for the genuine tea flavor as distinguished from the smoky, sour, etc., flavors which sometimes affect it and are by some believed to be due to impurities.

We are informed that during the past four years, since the Cruickshank brief was submitted, general satisfaction among a majority of the trade and among consumers has continued. Almost without exception the standards of these four years have been so low that the cheapest genuine teas possessing the tea flavor in any substantial strength have continued to come freely into the United States. In 1901, however, the standard of one particular district out of the thirteen (see Regulation XIX, *supra*) was fixed so high that during the following year a considerable amount of reasonably pure tea of reasonably good quality was non-importable. This arose through one of those practical difficulties that must occasionally occur in the administration of any statute. It is of course necessary, in order to carry out the objects of any such system, to obtain for use in the market a certain number of chests of tea from each district which shall be absolutely uniform as to purity and quality. This is because the samples must be distributed not only to the custom-houses at all the principal ports of the United States and to all the large dealers in the country, but also to all persons in the tea-raising country who are engaged in buying for

export to the United States. The foreign buyer, the American importer, and the Government examiner must all have samples which are absolutely uniform in every respect; otherwise the administration of the act would be accompanied with gross unfairness and serious injury to the trade. It is therefore incumbent upon the Board of Tea Experts in fixing the standard for a particular district to obtain a certain number of chests of tea which shall be uniform, and as near as may be combine the *minimum* permissible of purity with the *minimum* permissible of quality. It may be that a trifling amount of tea is obtainable which, while of lower quality still than the standard selected, would be proper for selection if a sufficient amount of uniform quality could be obtained; but because not enough is obtainable it must be rejected. On the other hand, teas which would pass muster as to quality may be so impure that they have to be rejected as standards on that account.

Now this is what actually happened in the case of country green teas in 1901, as described in the testimony of Mr. George Hewlett, who has been the chairman of the Board of Tea Experts for the past five years (pp. 27–29):

> When this standard of 1901 was adopted I was a member of the board; that board consisted of seven members, two from New York, two from Chicago, one from Boston, one from Philadelphia, and one from San Francisco. Once a year all the members

attended at the sessions of the Tea Board. All the members attended at various sessions. Every member was not present all the time that the board was in session. In my opinion the quality, using the phraseology of Exhibit 8, of the tea which was selected as the standard by the board was a Hyson of a fine Teenkai chop. By a Hyson I mean one of the last lines in an invoice of green tea made out of the coarsest leaf on the invoice. It is made out of the coarsest leaf, and the Gunpowder is the finest leaf, and there is a gradation between Hyson and Gunpowder, so that by selecting a Hyson of a fine Teenkai we select the coarsest and poorest of that fine Teenkai. * * * At the time this Hyson of a fine Teenkai was selected as the sample, the board made diligent search for any teas of lower grades—Hysons of lower grades—of pure teas in the New York market and obtainable by the trade, speaking of country green teas, and were unable to find any. * * * In my opinion there were no teas in the market at that time when the standard was selected that could have been obtained that were pure and that were inferior in cup quality to these teas which were selected as the standard, because I took pains to have diligent search made for such teas as could be bought in the necessary quantity for use as Government samples, and while such teas are produced they were not available for selection when the board was in session for the selection of samples.

True, the plaintiff and his expert witnesses claim that there were large amounts of country green tea of lower quality than the standard which were pure enough to have been admitted under the standard of the previous year; but they do not claim to have used the same care in testing for purity as is required by the Treasury Regulations (p. 33; see Regulation XXI, *supra*). The rejection of these teas was due to the opinion of the Board of Tea Experts that they had too much coloring matter. The witnesses conceded that they contained coloring matter, though claiming that there was not enough to do any harm (p. 34).

The recurrence of such a difficulty was immediately provided against, however, by the adoption, upon recommendation of the Board of Tea Experts, of the following regulation of 1902 (Regulation XX as amended):

> In examining Japans, Green Teas, and Congous, while limiting the comparisons in the matter of infused leaf and scum to the specific standard called for, examiners are to admit teas upon the question of quality, in the three kinds above cited, provided they are equal, in the case of Japans, to either the pan-fired or the basket-fired standard; in Greens, to either the country tea or the Pingsuey standard, and in Congous, to either the North China or the South China standard.

It should be noted that the use of the standard takes away the arbitrary character of the test by taste and smell. It does not take an extraordinary expert to compare two samples of the same variety of tea and ascertain which is the higher. That is all that comparison with the standard requires. Few persons have an accurate sense of absolute pitch in music, but most are able to tell whether one note is higher than another.

We respectfully submit to the court that every intendment is in favor of the constitutionality of the act (I); that under its power to regulate commerce with foreign nations Congress may exclude any article from such commerce without encroaching upon the liberty of the citizen (II); that it intended, for sufficient reasons, to exclude teas of inferior quality, although they might be sufficiently pure and not deleterious to health (III); that so far as the determination of the proper standard of quality was delegated to the Secretary of the Treasury such delegation was proper and actually necessary to effectuate the legislative intent (IV); that due process of law has not been denied to the plaintiff (V); and that plaintiff has not been damnified (VI).

I.

Every intendment is in support of the constitutionality of the act.

The rule was laid down as follows by Mr. Justice Peckham in the *Gettysburg Park case* (160 U. S., 668, 680):

> In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the Government.

Among other leading cases to the same effect we may cite *Pine Grove* v. *Talcott* (19 Wall., 666, 673); *Nicol* v. *Ames* (173 U. S., 509, 514–515); *Commonwealth* v. *Blackington* (24 Pick., 353, 355).

II.

The power to regulate commerce with foreign nations includes the power to prohibit the importation of these low-grade teas.

The truth of the proposition that Congress may exclude any article from foreign commerce was recognized by all of our early statesmen and constitutional writers and has never, so far as we are aware, been seriously disputed. During the first twenty-five years of our constitutional history Congress repeatedly went to the extent of prohib-

iting all foreign commerce whatever. When it did this by an embargo without limit of time—that is, when it passed what was in effect a permanent law abolishing all foreign commerce—the constitutional point was raised; but it was overruled by the district judge in Massachusetts (Hon. John Davis) in *United States* v. *Brigantine Williams* (2 Hall's L. J., 255, 28 Fed. Cas., 614). The point was not raised in any of the numerous cases under the embargo law which reached the Supreme Court of the United States, and the unlimited character of the power has since been conceded. (2 Story on the Constitution, secs. 1290, 1292; 1 Kent, 431–432). Thus for fifty years all drugs, medicines, and chemicals below a certain degree of strength have been excluded. (9 Stat., 237; Rev. Stat., sec. 2933 et seq.) The right to exclude any article from commerce with the Indian tribes, Congressional power over which is identical, is well settled (*United States* v. *43 Gallons of Whisky*, 93 U. S., 188, 194, 195); and it has recently been held that the right to regulate interstate commerce also implies the right to prohibit. (*Lottery Case*, 188 U. S., 321, 354, *et seq.*) Even the dissenting justices did not deny this implication as to the power to regulate commerce with abroad. (Id., p. 374.)

Indeed, the power of Congress to levy prohibitory tariff duties (that is, duties intended not for purposes of taxation, but to exclude certain articles from foreign importation altogether), when

so hotly challenged during the great disputes from 1824 to 1833, was based by Madison, Clay, Grimke, Verplanck, and its other leading defenders, solely upon the power to regulate commerce. Their arguments (which were set forth somewhat at length in the brief submitted on behalf of the Government in *United States* v. *Realty Company*, 163 U. S., 427, and more briefly in the *Lottery Case*, *supra*) received the indorsement of Mr. Justice Story (2 Story on the Constitution, § 1093).

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How., 272), the court pointed out that in considering whether a statute is consistent with due process of law it is of importance to consider the generally recognized practice in similar matters at the time of the adoption of the Constitution. Examination of the then prevailing practice as to the importation of foreign goods will show that it recognized no general right of importation at all. Indeed no policy was more common than that of limiting such commerce from any given foreign country to one or more individuals licensed by the legislature or the Executive for that purpose. (Leone Levi, History of British Commerce, 2d ed., pp. 30, 109, 235, 236; Adam Smith, Wealth of Nations, Book IV, Ch. I; New York Statute of March 15, 1781, ch. 29; 9 Hening's Virginia Statutes, 1778, p. 532.) From the start Congress wisely refrained from granting similar monopolies in time of general peace, but when commerce was, from time to time, laid under a

general embargo during the foreign wars, the right was recognized to give the President the right to issue similar licenses. (2 Stat., 500, 506.) The power to regulate commerce with the Indian tribes is contained in the same clause as the power to regulate foreign commerce, and is of equal scope. One of the early acts of Congress confined the right to trade with the Indians to persons holding special licenses. (1 Stat., 329.) Special acts of incorporation are of the same essential character.

The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; that the importation of goods from abroad is by permission of Congress; and that it is subject to such restrictions as Congress may see fit to impose and to the supervision of such officials as Congress may see fit to provide for that purpose.

The power to regulate commerce with foreign nations being an enumerated power, it is entirely unlimited so long as it does not violate any of the specific constitutional restrictions upon legislative authority. (*Lottery Case*, 188 U. S., 321, 353, 356.) An enumerated power is "distinct and independent, to be exercised in any case whatever." (*McCulloch* v. *Maryland*, 4 Wheat., at pp. 421–422; see *Doyle* v. *Continental Insurance Co.*, 94 U. S., 535, 541.) It acknowledges no limitations other than those prescribed in the Constitution. (*Leisy* v. *Hardin*, 135 U. S., 100, 108.) It may be used

for any lawful purpose. Thus, while Congress has no direct right to regulate agriculture and manufactures (*United States* v. *E. C. Knight Co.*, 156 U. S., 1), it may regulate commerce or adjust taxation for the encouragement of those industries. While it has no direct right to regulate the descent of real property in the various States, yet under the treaty-making power it can alter the laws of descent on behalf of the subjects of European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.)

The power of Congress over foreign commerce is much greater than that of the States over domestic production. The latter is not unlimited, but is restricted to that very indefinite sphere included within what is called "the police power;" yet even the States may prohibit the manufacture of an inferior article. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

III.

The intent of the statute is (and for proper reason) to exclude teas of inferior quality, though sufficiently pure and not unwholesome.

(*a*) *The legislative intent.* This was the question considered and decided in *Buttfield* v. *Bidwell* (96 Fed. Rep., 328) by the circuit court of appeals of the second circuit (Mr. Justice Peckham and Wallace and Shipman, JJ.). The opinion in that case, after going over the history of our legisla-

tion for the inspection of imported tea and specially referring to the amendments made by the Senate committee in its report upon the present act, said:

> As originally introduced in the House, the bill prohibited the importation of "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." It was amended in the Senate by inserting the word "quality" between the words "purity" and "fitness for consumption" wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act.

The precise question argued in that case was whether the word "quality" should be disregarded as surplusage and the words "fitness for consumption" construed as equivalent to "wholesomeness." The question was purely one of statutory construction; for the plaintiff, in order to maintain an

appeal to that court from a preliminary injunction order, was obliged to waive his point of constitutionality. The phrase above quoted, "or presumably or possibly so because of their inferior quality," predicates the legislative intent to exclude tea of the lowest quality upon the well-known fact that these very low qualities are the ones in which adulterations difficult of detection most occur. It is to be remembered that these adulterations are not necessarily made with deleterious substances. In fact, food adulterations, although they be frauds, are more commonly harmless than not. The adulterations which Congress sought to prevent in the case of imported teas are adulterations by intermixture of the leaves of plants otherwise similar, but destitute of theine. Such adulterations can not be proved by any test for purity, but are detected by the sense of taste.

We have already stated the history of this enactment somewhat in detail. As the court said in the case just cited, it shows that the word "quality" was not unnecessarily amended into the bill for the purpose of constituting a mere surplusage, but "was industriously inserted to make the act a more stringent substitute for the existing legislation."

Even if the word "quality" had been part of the bill from its first introduction, proper rules of statutory construction would require that it be given independent force, for no unwholesome article is fit for consumption, and therefore if the

words "fitness for consumption" are equivalent to "wholesomeness" the word "quality" is left without any function in that regard. But, as said in *Market Co.* v. *Hoffman* (101 U. S., 112, 115–6):

> It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

The fact that the word was inserted in so many places by amendment, with a report stating an intent to exclude articles so low in quality as to be "ruining the business" and properly describable as "worthless rubbish," confirms the argument.

The term "quality," according to the Century Dictionary's general definition, means "Degree of excellence or fineness; grade, as the food was of inferior quality; the finest quality of clothing."

The trade meaning of the term is also independent of the questions of purity and wholesomeness. The Government test for "quality" is identical with that adopted by the tea trade, as is shown by the testimony of plaintiff's witnesses (Record, pp. 21, 23).

The act is to be considered according to its intent. It is remedial and to be construed as such, notwithstanding that the tea must be destroyed to

get rid of it if the importer refuses to send it away within six months after its rejection. (See *United States* v. *Stowell*, 133 U. S., 1, and cas. cit.)

The fact that the word "quality" is not contained in the title is immaterial. The explanation is obvious. The original bill was intended only to exclude teas that were impure and unwholesome. The title truly and completely stated the intent. When the Senate committee decided to broaden the scope of the legislation and exclude all of the lowest grade teas, the title was overlooked and remained in its original form. The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context, and not in the title. (*Patterson* v. *Bark Eudora*, 190 U. S., 169, and cas. cit.) As said by Mr. Justice Field in *Hadden* v. *The Collector* (5 Wall., 107–110):

> These observations apply with special force to acts of Congress. Everyone who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title [citing instances].

It is quite common for the title of a statute to be narrower than the statute itself, and the reason often is (as in the present case) that the original bill, while in its progress through Congress, is

broadened by amendment without a corresponding amendment to the title.

Perhaps the most familiar instances in the Federal courts are in the subtitles or headings of the tariff acts, which are so often absurdly insufficient to cover the articles therein enumerated. Thus, sponges used to appear under the heading of "Chemicals, oils, or paints," and cork under "Flax, hemp, and jute." (21 Atty. Gen. Opin., 67; *Hollender* v. *Magone*, 149 U. S., 586, 591; *Seeberger* v. *Schlesinger*, 152 U. S., 581, 583.)

(*b*) *The reason of the law.* The statute being based upon an unlimited power of Congress, it is unnecessary to argue in its justification. The reason, however, was one for the proper consideration of Congress. True, the operation of the statute will occasionally, as in this case, exclude an article not objectionable in itself, because as a result of the practical difficulties of fixing thirteen standards every year, there must be an occasional failure to hit the mark precisely. This must be always the case with every general statute. Such things occur continually in the operation of the high protective tariff laws. A rate of duty intended to be prohibitive occasionally fails to keep out all of the particular article against which the prohibition is directed. A duty not intended to be prohibitive occasionally prohibits. These things are dependent on general price movements and other contingencies. They sometimes cause great

and unavoidable loss to a particular merchant. The duties operate to ruin his venture or to enable a competitor to undersell him. Fortunately no such unavoidable mischance is possible under the present law. Everybody knows, before the season for ordering teas, what teas can be ordered and what can not.

In adopting this legislation, according to the assumption of the circuit court of appeals in the case above cited, Congress intended to shut out all of the very low grades of tea in order to make sure of shutting out all adulterations. Congress considered it better to exclude everything rather than to get possibly a small supply of good stuff with certainly a much larger supply that was a worthless deception. This reasoning underlies many more things in the statutes- as, for instance, the anti-trust law, which makes all combinations in restraint of trade unlawful as the best means of preventing all combinations which would be deleterious to the public.

IV.

The delegation of details to the Secretary of the Treasury was proper, and indeed absolutely necessary.

There is nothing new about the establishment of physical standards. The Treasury Department at an early day had established standards of weight and measure. (5 Stat., 133.) Nor has the practice been confined to materials of such slight perishability as those just referred to. At least as

early as 1867 the Department, under statutory direction, commenced the system of preserving standard samples of wool and hair for the purpose of comparison, precisely as under the present act. (14 Stat., 560; Rev. Stat., sec. 2916.) As early as 1864 the statutes provided for the preservation of standards "by which the color and grades of sugar are to be regulated." (13 Stat., 202; Rev. Stat., sec. 2914.) The adoption of standards was "to insure certainty and uniformity," and the Secretary performed his duty "by procuring the standards from the proper parties at Amsterdam and furnishing them to the collector." (*Merritt* v. *Welsh*, 104 U. S., 694, 702–705.)

Congress can directly enact nothing that can not be formulated into words. A package of tea can not be put into a statute book. When Congress, as a result of long past experience, reached the conclusion that a package of tea must every year be selected for a standard, it necessarily reached the conclusion that the selection of the package must be left to some executive officer.

A denial of Congressional power to delegate this duty amounts to a partial denial of the right to regulate commerce with foreign nations—for, if Congress can not exercise a power in the only possible way, the power is practically nonexistent.

Some stress has been laid by the opponents of the law upon the argument that the powers given to the Secretary of the Treasury are subject to

abuse. It would be impossible to administer the Government if powers susceptible to abuse were withheld from executive officers. While this power is susceptible of abuse, the probability of abuse is particularly small. Tea is a commodity of almost universal consumption, especially among the poor. No Secretary will ever permit it to be set apart as a mere luxury for the rich.

It has often been laid down as an axiom of constitutional law that a Federal or State legislature can not delegate legislative power. The axiom, however, is one which very seldom invalidates a statute. The line between the province of the legislature and that of the executive is difficult to determine (*Wayman* v. *Southard*, 10 Wheat., 1, 46; *In re Oliver*, 17 Wis., 681), and, by application of the fundamental principle of constitutional law, the statute is to be given the benefit of any doubt. Carrying into effect in detail the legislative will is generally left to executive officers, although the details may be settled by the legislature if it desires to do so. There is thus a very broad field in which the legislative and executive functions are coordinate.

Recent decisions of this court recognize that to rigidly enforce the doctrine that Congress can not delegate legislative power would often in effect be a restriction upon legislative power, and they allow to Congress very wide latitude in this respect.

The leading authority is *Field* v. *Clark* (143

U. S., 649, 680–694). That case discussed the reciprocity clause of the McKinley tariff act of 1890, which authorized and directed the President to levy certain import duties upon the products of foreign countries whose tariffs "*he may deem to be* reciprocally unequal and unreasonable." Strong attack was made upon the law on the ground that there was no standard of inequality or unreasonableness fixed, so that the President was in effect given a legislative discretion. The objection was overruled, only two justices dissenting. Among the precedents cited in the report of the case is the act of 1874, permitting the President to suspend the consular courts of Turkey and Egypt whenever he shall "receive satisfactory information" that the governments of those countries have "organized other tribunals likely to secure to citizens of the United States in their dominions the same impartial justice which they now enjoy there," etc.

The McKinley reciprocity clause is very similar in construction to the present act. Congress indicated a desire to retaliate against all foreign tariffs which are "reciprocally unequal and unreasonable," but gave no indication as to what its standard of inequality and unreasonableness would be. On the contrary, it most expressly left the determination of this matter to the President and intrusted to him the sole responsibility of putting the law into effect, leaving his discretion entirely untrammeled. So in the present statute, Congress having indicated that it desires all tea imported in the

future to be substantially pure, good in quality, and fit for consumption, turns the matter over to the Secretary of the Treasury and the assistants whom he is authorized to call together, knowing them to be much better qualified than itself to fix standards for the carrying into effect of the legislative will.

In *Dunlap* v. *United States* (173 U. S., 65) the tariff act of 1894, as construed by this court, provided for a rebate of the alcohol tax to manufacturers in case the Secretary of the Treasury should find that such rebate was practicable, and make regulations accordingly. The Chief Justice said, in delivering the opinion of the court (p. 71): "But if the right of the manufacturer could not inure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary, or if he had found that it was not practicable to enforce such as he believed necessary without further legislation, then it is obvious the right to the rebate would not attach." The constitutionality of this legislation was strenuously attacked by the able counsel who appeared for the manufacturers, but the majority of the court held that Congress "may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, *and if so, whether further legislation would be required.* It is true that the right to the rebate was derived

from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so" (p. 74).

It has been held in lower courts that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decisions are to the contrary. (*United States* v. *City of Moline*, 82 Fed. Rep., 592; *E. A. Chatfield Co.* v. *New Haven*, 110 Fed. Rep., 788.) The question has not been passed upon in this court. (*Montgomery* v. *Portland*, 190 U. S., 89, 106–107.) The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defense. (*United States* v. *Ormsbee*, 74 Fed. Rep., 207, 209, and cas. cit.)

In *Dastervignes* v. *United States* (122 Fed. Rep., 30), the circuit court of appeals for the ninth circuit discusses the power of the Secretary of the Interior to make regulations concerning the forest reservations of the United States, under the sundry civil appropriation act of June 4, 1897 (30 Stat., 35). The powers exercised by him are sustained, and the plaintiff in error held to have been properly convicted for breach of one of his regulations.

Tremendous legislative powers were delegated to President Washington by some of our earliest

legislation. Thus by the act of June 4, 1794, chap. 41 (1 Stat., 372), he was, "*whenever in his opinion the public safety shall so require*, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same *whenever he shall think proper;*" the embargo to terminate in fifteen days from the next actual meeting of Congress. No standard was given him to which to refer. Similar wide powers were four times granted to Presidents Adams and Jefferson (1 Stat., 615; 2 Stat., 9–10, 352, 411). The tonnage act of March 3, 1815 (3 Stat., 224), repeals discriminating duties as to any foreign nation whenever the President "*shall be satisfied* that the discriminating or countervailing duties of such foreign nation, *so far as they operate to the disadvantage of the United States*, have been abolished." Here again no standard was given him. He was merely to exercise the act—legislative in essence—of deciding whether a certain condition of things was generally disadvantageous to the United States. More radical powers, with a discretion at least equally wide, were granted by the Canadian reciprocity act of March 3, 1887 (24 Stat., 475). Equally wide discretion is given by the food acts (Rev. Stat., sec. 2494; act of August 30, 1890; 26 Stat., 414). These and similar enactments are set forth in the opinion of the majority in *Field* v.

Clark (*supra*). We proceed to the enumeration of some which were not there mentioned.

The Guano Islands act of 1856 (11 Stat., 119) delegated to the discretion of the President, unhampered by any rules or limitations, the question whether newly discovered guano islands should "be considered as appertaining to the United States;" and this was held "a strictly executive power" (*Jones* v. *United States*, 137 U. S., 202, 209, 217). Yet by the exercise of the power he annexed new territory to the Union.

It would be impossible to govern new conquests efficiently without a wide delegation of what would ordinarily be considered legislative power. Thus in the Porto Rico act of April 12, 1900, chap. 191 (31 Stat., 78–79), the Secretary of the Treasury was given power to designate the ports of entry and to approve regulations of the Commissioner of Navigation such "as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico * * * and for the admission of the same to all the benefits of the coasting trade of the United States." The Philippine legislation contained in the army appropriation act of March, 1902, chap. 803 (31 Stat., 910), is very sweeping. All *civil* powers "necessary to govern the said islands" are to "be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government," etc., full reports to be

made to Congress "of all legislative acts and proceedings of the temporary government instituted under the provisions hereof." Territorial governments have always been given great legislative powers by a delegation similar to that which is made by the States to their municipalities. (As to which see 1 Dillon on Municipal Corporations, § 308; *Paul* v. *Gloucester County*, 50 N. J. Law, 585, 600.) In this case, however, the Territorial legislature was not originally constituted by Congress. Congress delegated to the President the right to establish a legislature. The President established the Philippine Commission, and the extensive legislation of that Commission received thus its original warrant. It was indeed ratified by the Philippine act of July 1, 1902, chapter 1369; but the original act can not be considered unconstitutional except upon principles which would be most dangerous to the effective government of our distant dependencies (1 Columbia Law Review, 33, 35, 37), while the new act itself confers wide powers upon the President, as in relation to the regulation of commerce during periods of armed resistance to our authority (32 Stat., 692).

The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great. (See, for instance, *In re Griner*, 16 Wis., 423, and precedents cited.) We may refer, for instance, to the provisions of the civil-service act requiring that standards of

fitness for office be established, but leaving it to the President to fix the standards. The constitutionality of such provisions has always been upheld. (Opinion of Justices, 138 Mass., 601.)

No complaint seems ever to have been made of the act of June 26, 1848, chapter 70, "to prevent the importation of adulterated and spurious drugs and medicines" (9 Stat., 237; Rev. Stats., sec. 2933 *et seq.*), because it delegates power to determine the standards of "quality, purity, and fitness for medical purposes." That act was the prototype of the act now under discussion. The standards are not even fixed by an executive officer of this Government, but by "the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories." (Sec. 2935.) The Treasury Regulations are similar to those under the tea act. Thus among the articles admitted are "aloes when affording 80 per cent of pure aloetic extractive." Under "opium" is a provision that "the percentage of morphia contained in imported crude opium must be ascertained by what is known as Dr. Squibb's method of analysis." Under "rhubarb" is the following: "None admissible but the article known as East Indian, Turkey, or Russian rhubarb." (Customs Regulations, 1892, pp. 370–372.) Delegation to a State board of health of the power of "regulating minimum standards of food and drugs" was sustained in *Isenhour* v. *State* (157 Ind., 517, 521–522).

By the agricultural appropriation act of March 3, 1903, chapter 1008 (32 Stat., 1147, 1158), an appropriation is made, among other things, "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice." We are informed that a movement is in progress among the States to adopt by statute whatever standards the Secretary shall establish.

A recent example of the delegation of power to fix a standard for use in regulating foreign commerce is to be found in the provision for the free admission to this country of animals of "recognized breeds," the recognizing power being the Secretary of Agriculture. (Tariff of 1897, par. 473.)

By the Alaska act of July 27, 1868, chapter 273 (15 Stat., 240, 241, 246; Rev. Stat., secs. 1955, 1956), the importation and use of firearms was made subject to the discretion of the President, while the power to make game laws as to fur-bearing animals was delegated to the Secretary of the Treasury.

The Secretary of the Treasury is also made the sole judge of the expediency of increasing the subsidiary copper coinage. (Act of February 12, 1873, c. 131, sec. 30; 17 Stat., 429; Rev. Stat., sec. 3529.)

Congress can authorize the Secretary of the Treasury or Secretary of the Interior to require, in their discretion, oaths the violation of which is ground for prosecution for perjury. (*United States* v. *Bailey*, 9 Pet., 238; *Caha* v. *United States*, 152 U. S., 211, 219.)

In establishing a bankruptcy system it can delegate to each State the determination from time to time of the exemptions which are to be recognized by the Federal courts within its limits in the interest of local uniformity of practice. (*Hanover Bank* v. *Moyses*, 186 U. S., 181, 189–190.)

These are but instances selected from an immense variety to be found in the Federal statute books to the same effect.

Similar instances may be found everywhere among the statute books of the various States and decisions thereunder.

Thus we may refer to the discretion given to the courts as to the admission of attorneys, which is not confined to the case of attorneys who are to exercise the privilege of appearing in court. So the establishment of a standard of fitness for admission to medical practice may be fixed by a State medical society or university. (*Hewitt* v. *Charier* 16 Pick., 353.)

In *State* v. *Heinemann* (80 Wis., 253, 257, 258) a number of statutes are referred to, which have received the approval of the courts, which grant to State boards the right to examine and license candidates for entrance into certain occupations, such

as medicine, dentistry, pharmacy, plumbing, and locomotive engineering. The standards of quality are fixed by these boards.

In *Dent* v. *West Virginia* (129 U. S., 114, 122) Mr. Justice Field refers to the common legislative practice "to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal." In the case cited one of the qualifications for the practice of medicine was a diploma from "a reputable medical college in the school of medicine to which the person desiring to practice belongs." The State legislature thus delegated the fixing of standards to nonofficial bodies whom it considered more competent in that particular than itself. The subject is again considered by this court in *Reetz* v. *Michigan* (188 U. S., 505); and to the same effect see *Overshiner* v. *State* (156 Ind., 187, 193); *Scholle* v. *State* (90 Md., 729).

In *Martin* v. *Witherspoon* (125 Mass., 175) it was held proper to authorize the governor and council "to prescribe under what circumstances outgoing vessels shall be compelled to take pilots."

Municipal officers may be authorized "on grounds of expediency amounting almost to necessity" to

make regulations, the violation of which shall be subject to criminal prosecution by the State's attorney. (*Brodbine* v. *Revere*, 182 Mass., 598.)

In re Flaherty (105 Cal., 558), quoted by this court with approval in *Wilson* v. *Eureka City* (173 U. S., 32, 36–37), an ordinance giving a single municipal officer absolute discretion to permit or forbid the beating of drums on the street was sustained; and the courts cite a large number of similar decisions. This court in the latter case cites also an ordinance allowing the mayor of Boston to decide whether anyone shall be allowed to address the public in public grounds.

This license system, so common in our municipalities, is a yet more advanced instance of the delegation of discretion to the executive officers; for they are not required to establish standards at all, but may limit the number of licenses to be issued and select the licensees according to their own discretion. At a time when all foreign commerce was interdicted by embargo and the coasting trade was put under heavy restrictions, a licensing power was given to the President, to be exercised according to his discretion. (Embargo acts of 1808–9, 2 Stat., 500, 506.)

Of similar character, as pointed out by Judge Cooley, was the power given to the President during the civil war to suspend the writ of *habeas corpus*. (Cooley's Constitutional Law, 2d ed., pp. 100–101.)

The decisions of certain State courts (there are no such decisions of this court) holding statutes to be void as involving a delegation of legislative power are based upon a rigid theory as to the division of power between the three coordinate branches of the Government, which theory has been found so impracticable that it has been very much relaxed by the general weight of authority. Many interesting instances might be quoted where these spheres have been held to overlap.

Thus the pardoning power is granted by the Constitution to the President; but the remission of penalties, which is a branch of the pardoning power, was assumed from the time of the First Congress to be within legislative jurisdiction (6 Stat., 3), and was then delegated by Congress to the Secretary of the Treasury. (*The Laura*, 114 U. S., 411, and statutes cited.)

The recent case of *United States* v. *Duell* (172 U. S., 576) sustains a direct appeal from the Commissioner of Patents to the court of appeals for the District of Columbia, thus affording a most striking illustration of the principle that the same act may be both executive and judicial in character; and other instances to the same effect are collected in the article on "Federal Judges and Quasi Judges," in 6 Yale L. J.

Rules of court sometimes revolutionize the settled methods of procedure in litigation. Such rules are legislative in character, the right to legislate in this manner being delegated to the courts.

We have thus far argued this question of delegation of power as if there be really a broad constitutional principle, such as is claimed by the appellants, debarring the legislature from delegating any portion of its legislative discretion to an executive officer, even though the legislature be of the opinion that the object which it desires to attain would be better effectuated by such delegation. It may be considered bold for us to contest this doctrine after it has been so often laid down. The doctrine never has, however, been made the basis in this court of a decision invalidating any particular statute. Every recognition which it has received here has been *obiter*.

It must, of course, be conceded that the legislature can not delegate distinctively legislative functions to the executive or to the judiciary without the consent of the latter. No department can be made to do the duties of another department except by its own consent.

It may be safe to concede also that a statute can be conceived of—although perhaps none has ever been actually enacted—which would be uncontestably void as a delegation of legislative power. Thus if we assume that at the end of the second year of a Presidential term one of the political parties is in possession of the three branches of the legislature (President, Senate, and House), and that the Senate and the House are about to pass into the control of the opposite party by less than a two-thirds majority, it may be conceived

that a law might be enacted delegating the entire legislative power to the President for the remainder of his term; and such a statute may be conceded to be unconstitutional.

But we have already shown the doctrine to be full of exceptions, and we believe that the analogy of these exceptions, properly applied, would sustain every statute *which evinces upon its face a legislative belief that some executive officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires*—that no such statute can fail of operation unless at least the officer upon whom the burden is cast declines to bear it.

V.

Due process of law was not denied to the plaintiff.

He complains that he did not have a hearing. It does not appear that he asked for a hearing. The regulations did not deny him a hearing. So far as appears, he might have been heard both before the Board of Tea Experts and the Secretary of the Treasury upon the establishment of the standard in 1901, and before the General Appraisers upon the reexamination of his teas in 1902. If it is really the fact, as he claims, that he had three or four thousand packages of pure tea of lower quality than the standard of 1901 at the time when that standard was under consideration, it was his own fault that he did not supply the Board of Tea Experts with a sufficient quantity for use.

His complaint seems to be that the statute and regulations did not have any express provision on the subject of a notice and hearing. His counsel states (although not upon any testimony in the record) that the Board of Appraisers refused to permit the importer to be present at the examination of his teas or to furnish him with knowledge as to what persons were called as experts. In the absence of any evidence upon this point and in the absence of any objection by the plaintiff at the time of the examination, the point can not be raised here. In fact, however, the point would have been untenable if it had been raised and the necessary evidence to support it produced, except that possibly if he had asked for notice and a hearing the Board of Appraisers might have been obliged to listen to what he had to say (as to which it is not necessary to argue in the case at bar); but he was not entitled to see the experts or know who they are. This has long been settled in the analogous case of *customs reappraisals*.

It is a necessary practice in the administration of customs laws, on account of the difficulty of obtaining proper expert assistance if the parties are known to each other, since fear of subsequent ill feeling between merchants deters the experts from giving their assistance. It has been found wise in many such cases to adopt the practice of keeping the name of the importer unknown by the

experts, and the names of the experts unknown by him.

This particular question was fully argued and decided in *Origet* v. *Hedden* (155 U. S., 228, 236–8). In that case (a reappraisement under the old law) plaintiff's attorney asked leave to be present at the hearing, cross-examine the witnesses, or suggest questions to the appraisers, hear and know the testimony, etc., and also that plaintiff should be present. The appraisers denied the application, while expressing a desire to hear what the plaintiff might have to say and receive any suggestions he might make as to asking questions. The refusal was due to the Treasury instructions of June 9, 1885, which were in the interest of secrecy. The court held, following *Auffmordt* v. *Hedden* (137 U. S., 310, 312–18, 323–4), that the instructions were reasonable and proper. In that case as here, plaintiff relied upon *Stuart* v. *Palmer* and *Palmer* v. *McMahon*. This court fully sustained the Government's position, saying: "Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect to their levy and collection are framed in view of the character of the transaction."

In the Auffmordt case (137 U. S., p. 329) the court had said that "the Government has the right to prescribe the conditions attending the importation of goods upon which it will permit the

collector to be sued." A notable proof of this is to be found in the act of 1839, which took away altogether the right to sue a collector to recover moneys paid under protest, and left the importer without remedy. (*Cary* v. *Curtis*, 3 How., 236.)

The distinction is well settled between the taking of a man's property by right of the power of taxation, and the refusal of permission to bring foreign goods into the country except upon certain conditions to be imposed.

(*b*) Assuming the act otherwise to be constitutional, the provision for destroying teas not exported within six months after their rejection is constitutional also. It is necessary to dispose of the teas somehow. The importer is given ample time to remove them. His refusal to do so within six months may properly be regarded as an abandonment of the goods. Even if it were regarded as a penalty, this also is fully sustained by the cases in this court which approved the exaction of the 20 per cent so-called "additional duty" imposed by section 2900 of the Revised Statutes for the offense of overvaluation. This "additional duty" was levied as a matter of course if the reappraisement, after proceedings such as in the Origet case, resulted in a finding that the goods were worth 10 per cent above the value declared by the importer in his entry. This finding was final, and the importer's only remedy

was by a humble appeal to the dispensing power of the Secretary of the Treasury. (*Passavant* v. *United States*, 148 U. S., 214; *Origet* v. *Hedden*, *supra*, at p. 236.) It was not disputed by the Government that this "additional duty" was a penalty in the strictest sense of the word. It had been so held as far back as 1843 (4 Op., 182) and had been reaffirmed by the then Attorney-General (20 Op., 660), and that fact was conceded upon the argument of the Origet case.

It is, of course, clear that a person who imports nonimportable goods may properly be put to the expense of taking them away again. In this respect the case is precisely similar to that of the return of an alien immigrant at the expense of the transportation company that has brought him into our ports. (Act of September 13, 1888, chap. 1015; act of March 3, 1891, chap. 551.) Yet under these statutes the inspectors are not required to take any testimony at all, while their decision is absolutely final. (*Nishimura Ekiu* v. *United States*, 142 U. S., 651, 663; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Chin Bak Kan* v. *United States*, 186 U. S., 192.)

VI.

Plaintiff was not damnified by the act of 1897 or by the standard of 1901.

We have already shown that he is not entitled to legal relief. He is not even entitled to sympathy. In March, 1901, he received notice that he could

not import country green teas during the coming season unless they were at least as good as the Hyson of a fine Teenkai. Ample time was allowed him to notify his buyers in China and to supply them with samples of the Government standard. As his own witness says (pp. 25–26):

> I think the buying season in China for green tea begins in the latter part of June. I am not conversant with the dates, and it runs usually until the market is exhausted of stock. These standards are announced for the season about the month of March, so that they can be sent out to China before the opening of the season; and the intention is that anybody who needs or desires to buy tea can obtain the Government standard in time to send to China so that the buyers will know what tea will be brought into the United States next season. The new standards, I believe, are adopted in February, the following winter, before the next season begins.

Either his loss is due to his own failure to notify his buyers in China; or it is due to their default, for which he is responsible as against others and they are responsible to him; or it is due to a plan of his own to import teas below the standard, procure a judgment establishing the unconstitutionality of the act, and thus undersell his competitors. If advised that the act is unconstitutional, this was a proper enough speculation on

his part, but he can not complain when the speculation proves unsuccessful.

For the foregoing reasons it is respectfully submitted that the judgment should be affirmed.

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